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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

NO. 901

D. D. HARRINGTON, ET AL., *Petitioners*,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondent, Natural Gas Pipeline Company of America ("Natural"), files this memorandum in opposition to certiorari sought by Harrington, et al.

The cause is for restitution of payments for gas, as they exceed the contract price, made under the mandate of an order of the Corporation Commission of Oklahoma, effective August 1, 1952, fixing a minimum price for gas greater than the contract price. The order was held void by this Court in *Natural* v. *Corporation Commission of the State of Oklahoma*, 349 U.S. 44 (April 11, 1955),[1] referred to as the *Natural* case.

Natural has filed a petition for certiorari from the decision below, complaining of a denial of interest for the period the

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[1]The petition refers to the case as "Panoma"; the case of *Natural* v. *Panoma Corporation* was a companion case arising under a prior order of the Commission; it has no relation to this controversy, except that petitioners, with some petulance, complain that Natural superseded in the former case but not in the latter; and Natural retorts that in both cases Panoma respected the order in the payment of royalties and taxes (for which petitioners had claimed credit).

order was being litigated. It asserts such denial: is categorically contrary to prior decisions of this Court; is wrong in principle because it leaves Harrington, et al. unjustly enriched by the use of the funds; is in violation of the policy of the Natural Gas Act; and erodes the principle of restitution in its application to the correction of administrative or judicial error.

We do not here discuss whether petitioners meet the qualifications of Rule 19, because the ensuing argument on the particular points will demonstrate they do not. In general, petitioners, receiving money under a void order, which thus was never beneficially theirs, urge that they be permitted to keep it, inconsistently with the common honesty expressed in the law of restitution, as applied to the correction of judicial and administrative error. Lest the primary law be forgotten, we attach, as Appendix A, a quotation from the excellent summary in *Reed* v. *Allen*, 286 U.S. 191 (1932), at page 203. The principle has continuously been reasserted, recently in *United Gas Pipeline Company* v. *Mobile Gas Service Company*, 350 U.S. 332 (1956).

We deny the following from the statement of the case, in the petition:

> "It is undisputed that these increased royalty and tax payments were necessary to continue in force the leasehold interests which contained the gas reserves dedicated under the gas purchase contract with Natural (T. 23,134)."

which is also immaterial.

Attacking seriatim the arguments of the petitioners, we say:

POINT I:

Asserting that the underlying order of the Corporation Commission of Oklahoma, of August 1, 1952, had validity and was ambulatory until the Federal Power Commission promulgated its 174 series of orders in the fall of 1954, with

conclusion that the order was in force when the over payments were made, that is, between August 1, 1952 and June, 1954.

Without boring the Court by an analysis of the Natural Gas Act,[2] it is enough to say that the *Natural* case held otherwise. The opinion states:

> "We held in Phillips Petroleum Company v. Wisconsin, 347 U.S. 672, that such a sale and transportation cannot be regulated by a State but are subject to the *exclusive regulation* of the Federal Power Commission. The Phillips case, therefore, controls this one."

Ex necessitate the Court had to consider the validity of the order (T. 48) as of its date, that is, on July 29, 1952, and its application to gas then to be sold; the order was complained of as of that time. If the Court had thought the Oklahoma order had any validity, it would have held it sound as of its date, down to the date of the *Phillips* case, or some other landmark, such as the series 174 orders of the Federal Power Commission.[3]

Expressly, and on the face of the decision, the contention is a twice told tale. It was urged on the Court in the *Natural* case, as witness the dissent of Mr. Justice Douglas:

> "Mr. Justice Douglas, being of opinion that State regulation of price is permissible until the Federal price regulation permitted by Phillips Petroleum Co. v. Wisconsin,

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[2]As early as 1942, the Act was held to preclude temporary or concurrent state action. See *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 U.S. 498. Certainly regulation of price is of such quality as to require exclusive control in the Federal authority.

[3]The series 174 orders were directed against producers thought in default, to cure the default; the Commission had already regulations applicable to all natural-gas companies.

The argument has its own metaphysics. Assume the *Natural* case was decided before the *Phillips* case: could the Court declare the validity, pro tanto, of an order held void.

347 US 672, 98 L ed 1035, 74 S Ct 794, is imposed, dissents."

In a further proceeding under the *Natural* case, the invalidity of the order was reaffirmed as to all sales, wherever made. *Michigan Wisconsin Pipe Line Company* v. *Corporation Commission*, 26 L.W. 3219 (Jan. 27, 1958).

The contention is an afterthought in the litigation, not raised below until leave was sought to file a second petition for rehearing. The Fifth Circuit, upon exchange of mail, denied the leave sought, according to a memorandum of March 22, 1958 (petition 35), upon the argument here made, citing the *Natural* case and the cases which have reaffirmed it.

POINT II:

Asserting that the court below disregarded the "existence" of the Oklahoma order; that it subjected restitution to a rigid legal formula.

These are abstractions. That the Oklahoma order had existence was recognized; payment under it was the precedent of the claim for restitution. What more is to be required of the court below is not clear.[4]

It is also said that the decision in *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U.S. 301 (1935) (the *Atlantic* case), announcing that restitution is ex gratia, required that the Court of Appeals abide by the discretion of the District Court in allowing certain credits there allowed.

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[4]The petitioners vaguely claim that the desired recognition is to be implemented by allowing credit for sums paid to royalty owners and for taxation, in recognition of the order. The Court of Appeals (petition 30-31) discussed these items at great length and concluded that no allowance should be made. Primarily, the law of restitution does not take into account the relations between the payee and third persons. See *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U.S. 531,533 (1918); *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138,145 (1945); *Ward* v. *Love County*, 253 U.S. 17,24 (1920).

The five to four decision in the *Atlantic* case has been severely limited by the decision in *Chicago R.R. Co.* v. *State of Illinois*, decided March 17, 1958, 26 L.W. 3266, wherein (by another five to four decision) this Court refused to interfere with the distribution of a fund, which was deposited in Court to abide the validity of an order under appeal, after the order was found invalid under circumstances that indicated probability that the invalidity was of form rather than of substance. Clearly, the *Atlantic* case must now be held restricted to its particular facts.

Further, a casual reading of the case indicates that the equitable discretion referred to is exercised only to refuse recovery of payments which, under the facts, should honestly be retained by the payee. There the discretion was exercised to save repayment under an order intrinsically sound, and defective only as to form. It is absurd to attempt to apply the doctrine to a situation where the order is found to be congenitally without potency.

And if the reasoning is guised in the verbiage of "judicial discretion," that does not refer to the fantasy or preference of a trial judge; the language refers to a "sound discretion" (as does that of Rule 19). Such discretion must be agreeable to the dogma of the undisputed succession of cases awarding restitution in aid of the correction of judicial error, and subservient to the requirement that when a recipient of money is unjustly enriched by the duress of a void judgment or administrative order, equity in good conscience requires him to return with interest the sums that are not his. Where the order is void there is nothing called judicial discretion that perpetuates such unjust enrichment.

POINT III:

Asserting that because Harrington had not filed the contract as a rate schedule there was an absence of rate; with

conclusion that in some way restitution for the exaction above the contract price violates the Natural Gas Act.

It is true that the duty was on Panoma to file the contract as a rate schedule as required by the Natural Gas Act; it is odd that the petitioners should claim benefit from such default. In the situation, any court would treat as done what ought to be done. There is also the learning of the *Mobile* case that the only rate that Panoma could have filed was that of the contract.[4] The Court of Appeals below (petition 27) disposed of the contention in the following language:

> "Since the *Phillips* decision, it has become clear to all of the parties that the contract should have been filed with the Commission. The failure to file it earlier, however, did not prevent the jurisdiction of the Commission from attaching. *Interstate Natural Gas Co. v. Southern California Gas Co.*, 9th Cir., 209 F. 2d. 380,384. There is nothing in the Natural Gas Act or in the orders of the Federal Power Commission to indicate that, under such circumstances, until the rates were filed there was *no* effective or lawful rate. To the contrary, the Act expressly provided for delay in such filing, and under the rationale of *United Gas Pipe Line Co. v. Mobile Gas Corporation, supra*, the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission. Any price in excess of the contract rate was then contrary to the spirit, if not the letter, of the Natural Gas Act.

We think that disposition is accurate.

POINT IV:

Asserting that the summary judgment was inapplicable because certain facts and circumstances should have been

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[4]We note that the petition (17) states that Panoma, had it known its obligation, "would have filed a just and reasonable rate without reference to the contract." This would have had its own difficulties in view of the *Mobile* case. Panoma could have filed only the contract.

investigated so that the equitable discretion of the court could be properly exercised.

The argument is predicated on the assumption that the *Atlantic* case projects upon the trial court a discretion that has authority to temper justice with the spirit of compromise; but quite detached from the fact that the payor is out his money. However, the argument has its weakness; to pursue this rationalization, the conclusion is reached that the court must have exercised its discretion in refusing attention to the items complained of.

The facts and circumstances which it is claimed should be investigated upon a full trial are itemized as follows:

> "Why did Natural supersede the first minimum price order and yet pay the second under protest? Did Natural voluntarily pay the increased price under the second order? Did Natural comply with the 9.8262¢ rate in order to obtain a rate increase from the Federal Power Commission? Was Natural's action actuated by a deliberate desire to place it in a strategic bargaining position with Petitioners? Or, were the excess payments made in response to some form of 'business duress'? Did Natural pay a reasonable price for the gas under the invalid order? If any restitution is to be allowed, is it equitable under all the circumstances to make the producer bear the burden of the added royalties and increased production taxes paid because of the first minimum price order? Did Petitioners actually threaten to shut down their wells unless Natural paid the minimum price established by the Oklahoma Corporation Commission? Or was this merely a figment of Natural's imagination?"

So far as the items are of objective fact (the "genuine issue as to any material fact" of Rule 56), same were fully explored ad nauseam by each of the two courts below. The proposed psychoanalysis of Natural's motivations were, of course, not thought requisite. The trial court observed (petition 49):

> "I think the suggestion that there may be other 'facts and circumstances' which would make an issue in the light of the equitable character of the remedy sought by the plaintiff is too indefinite to make a genuine issue as to a material fact. Counsel in argument and in response to my questions, indicated no particular material fact or circumstance which would be disputed; none are pleaded; and I believe the suggestion relates rather to the inferences and conclusions to be drawn from the uncontroverted facts already in the record than to any real dispute of fact."

For the reasons stated, we think the petition is improvidently filed.

Respectfully submitted,

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APPENDIX A

Extract from opinion by Mr. Justice Cordozo in *Reed* v. *Allen*, 286 U.S. 191 (1932), at 203:

> "The rule is abundantly settled both in this court and elsewhere that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. * * * Two remedies exist, the one by summary motion addressed to the appellate court, the other by a plenary suit. The books show that it has long been the practice to embody in the mandate of reversal a direction that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment.' * * * What this was might be ascertained through an order to show cause known as a scire facias quare restitutionem habere non debit. * * * Inquiry was then made whether anything had been taken 'by colour of the judgment', * * * with an appropriate mandate for the return of anything discovered. On the other hand, the litigant who has prevailed on the appeal is not confined to a motion for summary relief. He may elect to maintain an action, or the court in its discretion may remit him to that remedy. * * * One form of remedy or the other, however, is granted as of right. The remedy in its essence like the one for money had and received is for the recovery of benefits that in good conscience may no longer be retained. 'It is one of the equitable powers inherent in every court of justice, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' * * * Indeed, the correction may extend to cases where the postulants for restitution are not even parties to the record. * * * The whole subject has heretofore been dealt with in a spirit of the largest liberality. The judicial process has been moulded with an anxious effort to put an end as speedily as may be to wrongs originating in judicial errors."

CERTIFICATE OF SERVICE

I certify that on April , 1958, I deposited in a United States mail box, with first class air mail postage prepaid, copies of the foregoing petition, addressed respectively to counsel of record for Petitioners, at their post office addresses, that is:

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